In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1459

EUGENE P. RUEHLMANN, EXECUTOR OF THE ESTATE OF FRANCES FOSTER WELLS, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Frances Foster Wells died on January 27, 1964, owning shares in three open-end investment companies (Pet. App. 18). The sole question presented in this proceeding is the proper valuation of those shares for federal estate tax purposes.

Open-end investment companies (mutual funds) are organizations which issue as many of their shares as can be marketed and invest the proceeds in securities of other firms. The price at which shares in such companies are offered to the public ("asked" price) is net asset value (fractional value per share of the fund's net assets) plus a "sales load," the latter representing the payment given to underwriters and agents for

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their services in marketing the shares. The "sales load" may constitute as much as 8.5 percent of the net asset value of the shares. When the owner of such shares desires to sell them, the open-end investment company which issued them is, except in rare circumstances, the only available buyer. The shares are required by law to be redeemed by the issuer at net asset value ("bid" price). (Pet. App. 18–21.)

In the federal estate tax return filed on behalf of the Estate of Frances Foster Wells, petitioner valued the open-end investment company shares at their respective "bid" prices (Pet. App. 20–21). The Commissioner of Internal Revenue, following the method prescribed by Section 20.2031–8(b) of the Treasury Regulations on Estate Tax (1954 Code), valued the shares at the higher "asked" prices (Pet. App. 17). Petitioner challenged the resulting proposed deficiency in estate tax ($2,328.25) in the Tax Court on the ground that Section 20.2031–8(b) is arbitrary, unreasonable and inconsistent with Section 2031 of the Internal Revenue Code of 1954. The latter provision requires inclusion in the gross estate of the "value" of all property owned by a decedent at the time of death (Pet. App. 18, 23). In a reviewed decision, the Tax Court (six judges dissenting) sustained the action of the Commissioner (Pet. App. 27) and, upon petitioner's appeal, the Sixth Circuit affirmed (Pet. App. 17).

There is no conflict of appellate court decisions or any other basis for further review by this Court at this time.

1. Section 2031 of the 1954 Code requires inclusion in the gross estate of the "value" of all property owned by the decedent. Section 20.2031–1(b) of the Treasury Regulations, implementing that provision, states that value is "fair market value"—"the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." The basic difficulty here is that this classical definition of fair market value cannot easily be applied to open-end investment company shares, for which two markets exist—one in which they are bought, and one in which they are sold. Under these circumstances, the fair market value of such shares is either their redemption value ("bid" price) or replacement value ("asked" price), and a comparison of the majority and the dissenting opinions in the Tax Court discloses that there are many arguments supporting the selection of one and many supporting the selection of the other.

In this situation, the Commissioner, dealing with the specific situation, has prescribed the use of the "offering price," *i.e.*, the asked price. Sec. 20.2031–8(b) of the Treasury Regulations on Estate Tax. The case is thus one calling for the approach followed by this Court in *United States* v. *Correll,* 389 U.S. 299. There the Court held (*id.,* pp. 306–307) that the administrative construction of a tax statute is not to be set aside merely because alternatives to the Commissioner's rule are available or improvements may be imagined.

2. In any event, the issue presented is not ripe for review by this Court. The Sixth Circuit's conclusion is in accord with *Howell* v. *United States,* 414 F. 2d 45 (C.A. 7), affirming 290 F. Supp. 690 (N.D. Ind.), in which the gift tax counterpart of Section 20.2031-8 of the Estate Tax Regulations was approved, and also with *Norton* v. *United States,* W.D. Wash., Civ. No. 3666, decided November 26, 1969, and *York* v. *Commissioner,* T.C. Memo. 1969-246, ¶ 69, 245 P.H. Memo. T.C. Petitioner relies on the decision in *Davis* v. *United States,* 306 F. Supp. 949 (C.D. Calif.), now pending on appeal in the Ninth Circuit (Pet. 8–9). There is no basis for review here, however, unless and until the Ninth Circuit affirms *Davis,* thereby creating a conflict of appellate court decisions.[1]

3. Although petitioner argues that the question of valuation of open-end investment company shares may affect "potentially millions of taxpayers" (Pet. 6), there is no suggestion in the petition that the decision below will have a significant impact on the revenues. Section 1014 of the 1954 Code provides that property acquired from a decedent shall take as its basis for income tax purposes the fair market value of the property as determined for estate tax purposes.

[1] Petitioner also contends (Pet. 9–11) that the decision below is inconsistent with *Guggenheim* v. *Rasquin,* 312 U.S. 254; *Powers* v. *Commissioner,* 312 U.S. 259; and *United States* v. *Ryerson,* 312 U.S. 260, in which this Court held that, for gift tax purposes, single-premium life insurance policies are to be valued at their replacement cost, rather than cash surrender value. There is no inconsistency as asserted, since the court below also applied the replacement cost rule for the purpose of valuing mutual fund shares.

Accordingly, the higher estate tax yield from the Commissioner's method of valuing mutual fund shares may be more than offset by the resulting higher tax bases of such shares for income tax purposes. A relatively small fraction of estates actually pay any federal estate tax, but the higher income tax basis is allowed whether or not an estate tax has been paid. The fiscal impact of the method used for valuing shares of this type thus cannot be of substantial importance either to the Commissioner or to taxpayers as a class. If, however, a conflict of appellate court decisions develops, the issue here will be of widespread administrative importance, affecting not only estate and gift tax liabilities, but, in view of the basis rules, income tax liabilities as well.

The petition for a writ of certiorari should be denied. Alternatively, as petitioner proposes (Pet. 12), action on the petition should be deferred pending disposition of the *Davis* case by the Ninth Circuit.

Respectfully submitted.

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